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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/658,736	09/09/2003	Alan Shluzas	1291.1138101	3377
28075 7590 05/20/2008 CROMPTON, SEAGER & TUFTE, LLC 1221 NICOLLET AVENUE SUITE 800 MINNEAPOLIS, MN 55403-2420				
EXAMINER WOODALL, NICHOLAS W				
ART UNIT 3733		PAPER NUMBER		
MAIL DATE 05/20/2008		DELIVERY MODE PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/658,736

Applicant(s)

SHLUZAS ET AL.

Examiner

Nicholas Woodall

Art Unit

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Period for Reply -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 19 February 2008.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 20-29 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 20-29 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/CDC)
- Paper No(s)/Mail Date _____

- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

1. This action is in response to applicant's amendment received on 02/19/2008.

Claim Rejections - 35 USC § 103

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. Claims 20-29 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mathews (U.S. Patent 6,033,406) in view of Luque (U.S. Patent 4,790,297) and Foley (U.S. Patent 5,792,044) and Davison (U.S. Publication 2001/0011170).

Regarding claims 20, 24, 28, and 29, Mathews discloses a method of treating the spine via a posterior approach comprising placing a fusion device, i.e. a bone graft, in an intervertebral space between a first and second vertebrae and placing a bone growth material, i.e. osteoinductive proteins or morphogenic proteins, on the fusion device inserted into the intervertebral disc space. Mathews fails to disclose the method including the step of performing a two level fixation procedure spanning two intervertebral spaces between three vertebrae, advancing a decompression tool into the surgical site to perform a decompression procedure, i.e. a laminectomy and facetectomy, on the vertebrae, and inserting an access device in a first configuration through an incision of the skin until a distal portion is located adjacent the spine, actuating the access device to a second configuration having an enlarged cross-sectional area at the distal portion spanning at least a portion of the first, second, and

third vertebrae, and performing the surgical procedures through the access device.

Luque teaches a method comprising the steps of performing a two level fixation procedure in order to fix multiple joints of the spine together. Foley teaches a method comprising the step of inserting a decompression tool into the surgical site to perform a decompression procedure on the vertebrae in order to reduce pressure on the spinal cord. Davison teaches a method comprising the steps of inserting an access device in a first configuration through an incision of the skin until a distal portion is located adjacent the spine, actuating the access device to a second configuration having an enlarged cross-sectional area at the distal portion spanning at least a portion of the first, second, and third vertebrae, and performing various surgical procedures, such as decompression and fixation procedures, through the access device in order to provide a larger working area while reducing the amount of trauma experienced by the patient. It would have been obvious to one having ordinary skill in the art at the time the invention was made to perform the method of Mathews further comprising the step of performing a two level fixation procedure in view of Luque, the step of inserting a decompression tool into a surgical site to perform a decompression procedure on the vertebrae in view of Foley, and the steps of inserting an access device in a first configuration through an incision of the skin until a distal portion is located adjacent the spine, actuating the access device to a second configuration having an enlarged cross-sectional area at the distal portion spanning at least a portion of the first, second, and third vertebrae, and performing various surgical procedures, such as decompression and fixation procedures, through the access device in view of Davison in order to fix multiple joints

of the spine together, to reduce the pressure on the spinal cord, and to provide a larger working area while reducing the amount of trauma experienced by the patient.

Response to Arguments

4. Applicant's arguments filed 02/19/2008 have been fully considered but they are not persuasive. The applicant's arguments that the combination of Mathews, Luque, Foley, and Davison does not disclose the invention as claimed is not persuasive. As discussed above Mathews discloses a method of performing a spinal surgery. The examiner believes that Mathews fails to disclose the method fails to teach a multilevel procedure, using a decompression tool to perform a decompression procedure, inserting an access device in a first configuration and actuating the access device into a second configuration, and performing the method through the access device. First, the examiner relies on Luque to teach performing a multilevel fixation procedure in order to fix multiple joints of the spine. The applicant argues that Luque does not disclose performing the methods through an access device. Luque is not being used by the examiner to teach performing a spinal fixation method through an access device. The examiner is using Luque to teach performing a known spinal method over multiple spinal joints to fix multiple joints of the spine together. Second, the examiner uses Foley to further add the step of using a decompression tool to perform a decompression procedure during a spinal surgery. The applicant argues that Foley does not teach using a decompression of using a decompression tool and performing a decompression procedure. The examiner would like to point out that Foley teaches that procedures such as laminotomy, laminectomy, foramenotomy, and facetectomy, are performed

using rongeurs, curettes, and trephines (column 12 lines 16-25). It is well known that a laminectomy is considered a decompression procedure. Therefore, Foley teaches performing a decompression using a decompression tool through an access device. The applicant's argument that Davison does not teach a method wherein the access device is actuated from a first configuration to a second configuration is not persuasive. Davison teaches a method comprising the steps of actuating the access device from a first configuration to a second configuration (page 5 paragraphs 066 and 067). Davison and Foley further teach performing known spinal surgeries through an access device in order to reduce the trauma experienced by the patient (Davison page 1 paragraphs 001-003 and Foley column 1 lines 1-67). Therefore, the examiner believes that modifying the method of Mathews further performing a multilevel procedure in view of Luque in order to fix multiple spinal joints together, further performing a decompression procedure with a decompression tool in view of Foley in order to relieve pressure on the spinal cord, and further performing the know spinal procedures through an access device actuated from a first configuration to a second configuration in view of Davison in order to provide a larger working area while reducing the amount of trauma experienced by the patient is a proper combination that teaches all the limitations of the claims as presented by the applicant. The applicant's argument that Mathews and Luque teach away from performing the procedures through an access device. The references do not explicitly teach that the procedures are not capable of being performed through an access device. Furthermore, the Foley and Davison references explicitly teach performing know surgical procedures through an access device to reduce the trauma to

the patient. The applicant has not presented any claim amendments and the examiner has not provided any new grounds of rejection and has responded to the applicant's arguments making this office action **FINAL**.

Conclusion

5. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Nicholas Woodall whose telephone number is (571)272-5204. The examiner can normally be reached on Monday to Friday 8:00 to 5:30 EST..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Eduardo Robert can be reached on 571-272-4719. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Nicholas Woodall/

Examiner, Art Unit 3733

/Eduardo C. Robert/

Supervisory Patent Examiner, Art Unit 3733